No. 78-1124

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATHANIEL COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978. The petition for a writ of certiorari was filed on January 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether misappropriation of the labor of employees paid with federal funds under the Comprehensive Employment and Training Act of 1973 is punishable under 18 U.S.C. 665.

2. Whether the trial court was required to define certain terms used in its instructions to the jury.

3. Whether testimony referring to the Hatch Act was properly admitted at trial.

STATUTE INVOLVED

18 U.S.C. 665(a) provides in pertinent part:

> Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one count of embezzling and willfully misapplying property and funds subject to a federal grant under the Comprehensive Employment and Training Act (CETA), in violation of 18 U.S.C. 665. He was sentenced to a one-year term of imprisonment. The court of appeals affirmed (Pet. App. A1-A8).

Pursuant to the provisions of CETA, the Department of Labor entered into an agreement with the City of Gary, Indiana. Under that agreement, the Gary Manpower Administration (a city office responsible for funding) was authorized to administer various employment programs, including an Adult Work Experience Program

("Program") providing short-term sub-professional jobs (Tr. 90-97). Salaries of Program employees were paid by Gary Manpower with funds disbursed by the Department of Labor (Tr. 96-97, 112-115; Pet. App. A3). Under a subordinate agreement entered into between Gary Manpower and the city's General Services Department (GSD), Program trainees were assigned to GSD for work in that agency. Petitioner was the assistant director of GSD (Tr. 125-137; Pet. App. B6-B8).

In April 1975, petitioner took control of a special five-man crew of Program participants. Petitioner instructed this crew to work in a mayoral primary campaign, to provide labor for his private construction business, and to perform menial chores around his home (Pet. App. A4).[1] Petitioner used CETA trainees to construct and distribute political signs (Tr. 166, 170-172, 373, 412) and to paint houses for his construction company (Tr. 708-722). While working for petitioner's company, they also built a dog run and a shelter (Tr. 215-231), a residential foundation (Tr. 694-707), and fences (Tr. 722-732, 648-687, 688-693). In addition, petitioner used these employees throughout the summer to provide maintenance work (Tr. 733-751) and custodial services (Tr. 414-415, 419-423, 201-210) under private contracts. While engaged in these activities, the CETA employees were unavailable to perform the public services for which they were paid under the federal program.

ARGUMENT

1. Petitioner contends (Pet. 8-10) that 18 U.S.C. 665 proscribes only misappropriation of money or tangible property subject to a federal grant, and that misappropriation of the labor of employees paid for by the

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[1] Under 29 U.S.C. 990, CETA funds may not be used to support "political activities." CETA funds may be used only to provide "public services" beneficial to the community. 29 U.S.C. 845(c)(3).

federal government is not an offense. Petitioner acknowledges (Pet. 8) that the decision below is the first to consider this issue under Section 665, which alone is reason for this Court to decline review of the issue at this time. In any event, the decision below is correct.

The statute makes it a crime for any employee connected with an agency receiving CETA funds to embezzle, misapply, steal, or obtain by fraud "any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance * * *." This prohibition provides broad protection against wrongdoing by those entrusted with federal grants. By employing the word "any," by separately enumerating money, funds, assets, and property, and by describing in various alternative ways the prohibited means for misappropriating such wealth, Congress obviously manifested an intention to sweep broadly. The terms used by Congress do not lend themselves to restrictive interpretation. See, generally, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978). Nothing in the comprehensive language used by Congress suggests that the statute should be limited to "tangible" property interests.

As the court of appeals recognized, the right to receive services stemming from the payment of money under a contract of employment is a form of property interest.[2] A contractual right to services is a type of wealth similar to other kinds of intangible property rights. See, *e.g.*, *In Re Ira Haupt & Co.*, 424 F. 2d 722, 724 (2d Cir. 1970). There is, moreover, no significant difference between

[2]Although the legislative history does not provide a definition of the term "property," the customary legal meaning of the term "extends to every species of valuable right and interest," including "tangible or intangible" interests. *Black's Law Dictionary* 1382 (1968 ed.).

diverting the labor of employees paid by the federal government and diverting the funds used to pay them. The money of the federal government is misappropriated to the same degree by either device. As the court below noted: "[w]illful misapplication of services generated by the granted funds is indistinguishable from willful misapplication of funds themselves" (Pet. App. A7). The construction proposed by petitioner would create a gaping hole in the protection of the integrity of CETA programs that was clearly Congress's purpose in enacting Section 665.

Petitioner's assertion that the term "property" should be limited to "tangible things" (Pet. 12) is, moreover, refuted by the case law construing statutes similar to 18 U.S.C. 665. Thus, under 18 U.S.C. 641, which prohibits, *inter alia*, theft of property belonging to the United States, it is well settled that theft of intangible interests is forbidden. See, *e.g.*, *United States* v. *DiGilio*, 538 F. 2d 972, 976-978 (3d Cir. 1976) (misappropriation of various resources including the "time" of a government employee during "working hours"). See also *United States* v. *Lambert*, 446 F. Supp. 890, 896 (D. Conn. 1978) (misappropriation of information stored in a government computer).[3] Similarly, under the Hobbs Act, 18 U.S.C. 1951, which forbids obtaining the property of another person by threats of violence, it is settled that "property" is "not limited to physical or tangible property or things * * * but includes, in a broad sense, any valuable right considered as a source or element of wealth * * *." *United*

[3]The early case of *Chappell* v. *United States*, 270 F. 2d 274, 277 (9th Cir. 1959), relied on by petitioner, held that Section 641 does not apply to intangibles such as services of government employees. Later cases in the Ninth Circuit appear to have abandoned the tangible property requirement. See *United States* v. *Friedman*, 445 F. 2d 1076, 1087 (9th Cir.), cert. denied, 404 U.S. 958 (1971). In any event, the Ninth Circuit's prior interpretation presents no conflict here, because a different statute is involved. See Pet. App. A6.

States v. *Tropiano*, 418 F. 2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). See also *United States* v. *Nadaline*, 471 F. 2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973); *United States* v. *Santoni*, 585 F. 2d 667, 672-673 (4th Cir. 1978), cert. denied, No. 78-843 (Feb. 21, 1979) ("the property extorted was the right * * * to make a business decision free from outside pressure wrongfully imposed * * *").[4]

There is no ground for construing the language used by Congress in 18 U.S.C. 665 in a narrower fashion. As noted by the court of appeals:

> Congress was entrusting large sums of non-federal agencies to accomplish the purposes of CETA. A principal purpose was providing paying jobs to trainees. In § 665 Congress was exerting its power to protect these funds from misuse at the hands of employees of these agencies. * * * Recognizing that the term "property" is protean, capable of assuming varied meanings depending on context, and that the criminal law does not of necessity adopt the most restrictive meaning as the "literal terms," there is no reason to suppose that Congress intended to withhold protection from services purchased while extending the protection to tangible property purchased. * * * In the CETA context, we feel a contrary result would accomplish an absurd interpretation of the statute, one that should not be imputed to Congress * * *.

[4]The terms "property" and "goods" have frequently been construed to embrace intangible rights and interests under other federal criminal statutes prohibiting theft and fraud. See, *e.g.*, *United States* v. *Louderman*, 576 F. 2d 1383, 1387 (9th Cir.), cert. denied, No. 78-5084 (Oct. 10, 1978) (scheme to defraud telephone company of confidential information); *United States* v. *Bottone*, 365 F. 2d 389, 393-394 (2d Cir. 1966) (interstate transportation of copies of papers disclosing stolen trade secrets); *United States* v. *Lester*, 282 F. 2d 750, 755 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961) (interstate transportation of photocopies of stolen maps).

Pet. App. A6-A7.[5]

2. The district court defined the terms "embezzle" and "convert * * * to one's own use" in its charge to the jury (Tr. 1047-1048). Petitioner argues that the court also was required to define the terms "willfully misapplies," "steals," and "obtains by fraud" (Pet. 17). However, as noted by the court below, petitioner did not object to the district court's charge in compliance with Fed. R. Crim. P. 30, which required him to "stat[e] distinctly the matter to which he objects and the grounds of his objection." Petitioner only objected in general terms and did not direct the attention of the district court to the terms that he now asserts required further definition (Tr. 993). Moreover, petitioner did not tender instructions defining the terms in question. In these circumstances, he has waived the right to object. See *United States* v. *Hollinger*, 553 F. 2d 535, 546 (7th Cir. 1977); *United States* v. *Milby*, 400 F. 2d 702, 707 (6th Cir. 1968).

In any event, petitioner's contention is without merit because the terms in question required no further elaboration. Each of the terms left undefined by the district court was synonomous with wrongful taking and was well within the common understanding of the jury. See *United States* v. *Orzechowski*, 547 F. 2d 978, 985-986 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Long*, 534 F. 2d 1097, 1100 (3d Cir. 1976).

3. Petitioner's final contention (Pet. 15) is that the district court improperly admitted testimony referring to the Hatch Act, 5 U.S.C. 1501 *et seq.*, which proscribes

[5]Although criminal statutes are to be strictly construed, they should not be construed so strictly as to defeat the purpose of the legislature. See, *e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 354-355 (1943). Petitioner received fair warning from the statute that his systematic diversion of labor paid for by federal grants could constitute a misappropriation of government funds and property interests. See, generally, *United States* v. *Powell*, 423 U.S. 87, 93 (1975).

partisan political activities by state and local governmental employees. At trial, a Labor Department officer responsible for monitoring programs under CETA described the employment and training arrangement between the Department of Labor and Gary, Indiana. He noted that approval of the federal grant was contingent upon receiving assurances from the city that it would comply with all legal requirements, including the Hatch Act, and would prohibit political activities by program participants (Tr. 91-97, 98-99).[6] He further testified that officials involved in the administration of CETA projects are not permitted to participate in political activities during working hours, but disclaimed knowledge of the "ins and outs of the Hatch Act" (Tr. 99).[7]

The district court was within its discretion in permitting the representative of the Department of Labor to describe the basic requirements of the CETA program. Petitioner's disregard of those requirements was further evidence that he intended to use the five CETA trainees for improper purposes. By diverting the services of these employees into partisan political activities, petitioner willfully misapplied funds and property interests subject to the CETA grant, in violation of 18 U.S.C. 665.

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[6]29 U.S.C. 990 specifically incorporates the Hatch Act's prohibition of political activities by agency personnel.

[7]The General Services Department, of which petitioner was the assistant director, supervised and trained CETA employees and issued checks on behalf of Gary Manpower to compensate them. Petitioner was clearly involved in the administration of the CETA program and therefore was not permitted to engage in political activity or to require trainees to engage in political activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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